IN THE

Supreme Court of the United States

ALFRED J. KREPPEIN, JR., PETITIONER

v.

RYAN BRICE CRANE; LAUREL CRANE LUQUETTE AND FIRST COLONY LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. The court of appeals held that under Louisiana law a temporary restraining order entered at the beginning of a divorce which prohibits both spouses from disposing of marital property expires *automatically* when the scheduled preliminary injunction hearing is not held, regardless of the reasons why it was not held, thereby permitting a spouse who engineers a postponement of the show-cause hearing to dispose of marital property in the interim without any order by the Louisiana courts allowing her to do so, depriving petitioner of marital property without due process of law. Does this result overturn settled Louisiana divorce law, fail to give full faith and credit to a valid Louisiana judgment and deny petitioner fundamental fairness?

2. Do the federal courts undermine summary judgment procedure by deciding for themselves---- instead of letting a judge or jury determine after trial---- the crucial fact question of whether the foot-dragging conduct by petitioner's wife was undertaken to engineer a postponement of the preliminary injunction hearing so that she could avoid the time-limited TRO prohibiting her from disposing of marital property?

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The unpublished decision of the federal district court for the Eastern District of Louisiana, in *First Colony Life Insurance Company v. Alfred J. Kreppein, Jr.; Ryan Brice Crane and Laurel Crane Luquette*, C.A. No. 05-6849, filed August 24, 2007, granting the respondents' motion for summary judgment and denying the petitioner's motion for summary judgment, is set forth in the Appendix hereto(App. 21-32).

The unpublished decision of the federal district court for the Eastern District of Louisiana, in *First Colony Life Insurance Company v. Alfred J. Kreppein, Jr.; Ryan Brice Crane and Laurel Crane Luquette*, C.A. No. 05-6849, filed March 20, 2008, dismissing First Colony Life Insurance Company from this case, is set forth in the Appendix hereto(App. 15-18).

The unpublished judgment of the federal district court for the Eastern District of Louisiana, in *First Colony Life Insurance Company v. Alfred J. Kreppein, Jr.; Ryan Brice Crane and Laurel Crane Luquette*, C.A. No. 05-6849, dated and filed March 20, 2008, and

reported at 2008 U.S. Dist. Lexis 22296(E.D. La. 3/20/2008), declaring the respondents as the sole beneficiaries to the death benefits of the life insurance policy issued by First Colony Life Insurance Company to Stephanie Boyter Kreppein, is set forth in the Appendix hereto(App. 19-20).

The unpublished Petition for Divorce filed by the petitioner against Stephanie Boyter Kreppein in the Civil District Court for the Parish of Orleans together with the Temporary Restraining Order entered by Julien, J., both dated August 2, 2005, is set forth in the Appendix hereto(App. 34-40).

The unpublished order of the United States Court of Appeals for the Fifth Circuit in *First Colony Life Insurance Company v. Alfred J. Kreppein, Jr. v. Ryan Brice Crane and Laurel Crane Luquette*, C.A. No. 08-30409, decided November 14, 2008, denying the petitioner's petition for rehearing *en banc*, is set forth in the Appendix hereto(App. 33).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit affirming the district court's order granting the respondents' motion for summary judgment and denying the petitioner's motion for summary judgment and declaring the respondents the sole beneficiaries to the death benefits of the life insurance policy issued by First Colony Life Insurance Company to Stephanie Boyter Kreppein, was entered on October 16, 2008; and its further order denying the petitioner's timely filed petition for rehearing *en banc* was filed and decided on November 14, 2008(App. 1-

14;33).

This petition for writ of certiorari is filed within ninety (90) days of November 14, 2008. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article IV, § 1:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the tight of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the

States, are reserved to the States respectively, or to the people.

28 U.S.C. § 1332(a)(1):

> **(a)** The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000,exclusive of interest and costs, and is between—
>
> **(1)** citizens of different States....

28 U.S.C. § 1738:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated, by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the

courts of such State, Territory or Possession from which they are taken.

Louisiana Code of Civil Procedure, Art. 3604(A) and (B):

A. A temporary restraining order shall be endorsed with the date and hour of issuance; shall be filed in the clerk's office and entered of record; shall state why the order was granted without notice and hearing; and shall expire by its terms within such time after entry, not to exceed ten days, as the court prescribes. A retraining order, for good cause shown, and at any time before its expiration, may be extended by the court for one or more periods not exceeding ten days each. The party against whom the order is directed may consent that it be extended for a longer period. The reasons for such extension shall be entered of record.

B. Nevertheless, a temporary restraining order issued in conjunction with a rule to show cause for a preliminary injunction prohibiting a spouse from:

(1) Disposing of or encumbering community property;
(2) Harming the other spouse or child; or
(3) Removing a child from the jurisdiction of the court, in a suit for divorce shall remain in force until a hearing is held on the rule for a preliminary injunction.

Louisiana Code of Civil Procedure, Art. 3606:

> When a temporary restraining order is granted, the application for a preliminary injunction shall be assigned for hearing at the earliest possible time, subject to Article 3602, and shall take precedence over all matters except older matters of the same character. The party who obtains a temporary restraining order shall proceed with the application for a preliminary injunction comes on for hearing. Upon his failure to do so, the court shall dissolve the temporary restraining order.

STATEMENT

Petitioner and the decedent Stephanie B. Kreppein ("the wife" or "Mrs. Kreppein") were married in November of 2000(App. 2;22). During their marriage, the couple began accumulating debt on certain real estate investments they had made in Florida(App. 2). In order to protect each other from this debt in the event that one of them died, they mutually agreed that they would obtain life insurance policies, each naming the other as a beneficiary (*Id.*). Through a friend who was an insurance agent and broker, Terry Sullivan, they purchased these separate life insurance policies from First Colony Life Insurance Company ("First Colony") in February of 2003(*Id.*).

The term life insurance policy issued on the life of petitioner's wife was for $500,000 and it named petitioner as primary beneficiary(*Id.*). The wife named two children from another marriage-----the respondents Ryan Brice Crane and Laurel Crane Luquette ("the

respondents")----as contingent beneficiaries(*Id.*).

In May of 2005, petitioner's wife was diagnosed with terminal brain cancer and petitioner was caring for her at their domicile in New Orleans. On July 28, 2005, petitioner's wife was taken from her home by members of her family and moved to Baton Rouge for what petitioner believed was a short stay with her relatives(*Id.*). The next day, a withdrawal of $140,000 was made at the Baton Rouge branch office from the joint bank account maintained by petitioner and his wife(App. 2). At the same time, Terry Sullivan advised petitioner that an attorney purporting to represent petitioner's wife was asking Sullivan to change the primary beneficiary for her life insurance policy (*Id.*).

Although petitioner believed that his wife lacked the capacity to make these changes given her condition and was probably acting at the coercion of other members of her own family, in order to forestall further attempts by the wife and/or her family to diminish their joint marital assets unilaterally, petitioner on August 2, 2005, filed a petition for divorce in the Civil District Court for the Parish of Orleans, State of Louisiana(App. 3;22;34-40). He alleged that he and his wife had ceased living together in late July of 2005, but that during their marriage they had "acquired community properties and have incurred community obligations"(App. 35).

In addition, because of recent events, petitioner alleged that he

> fears that before a hearing can be had or notice given, the defendant, Stephanie Boyter Kreppein, will or may dispose of, alienate, or

> encumber some or all of the assets belonging to the community of acquets and gains existing between them, and will or may borrow against the cash surrender values and/or *change the ownership and/or beneficiaries of the policies of life insurance insuring the lives of the parties hereto*, causing [petitioner] immediate irreparable injury and harm. [The petitioner] seeks therefore and is entitled to the issuance of a Temporary Restraining Order...restraining, enjoining and prohibiting [petitioner's wife], or any other persons, entities, [etc.] ...claiming to act in [her] behalf from in any way whatsoever alienating, encumbering, or disposing of any or all of the [marital] assets;...*or changing the ownership and/or beneficiaries of any policies of life insurance insuring the lives of either of the parties hereto*....

(App. 35-36)(emphasis supplied). Consistent therewith, petitioner sought to have the wife show "on a date and at a time to be set by this Court" why a preliminary injunction should not issue with the same provisions(App. 36;38). Petitioner further sought to have returned forthwith the $142,000 taken by the wife or the wife's family from their joint bank account; to have a decree terminating their community property and partitioning same, and to have each of them prepare a Sworn Descriptive List of marital property(App. 36-37).

On August 2, 2005, the same day as petitioner filed his petition for divorce, Judge Ethel Simms Julien of the Civil District Court for the Parish of Orleans issued a Temporary Restraining Order ("the TRO")

which *inter alia* restrained, enjoined and prohibited the wife or any other persons acting in her behalf from encumbering the marital property or from "changing the ownership and/or beneficiaries of any policies of life insurance insuring the lives of either of the parties hereto...." (App. 38-39). Furthermore, Judge Julien set August 16, 2005, as the hearing date for the wife to show cause why a preliminary injunction should not issue with the same provisions as the TRO (App. 3;39-40).

The TRO was personally served on the wife on August 12, 2005 by the East Baton Rouge Parish Sheriff's Office(App. 3). On August 13, 2005, the wife's counsel and petitioner's attorney agreed to consolidate petitioner's divorce action with the wife's own divorce petition and to continue to a later date the scheduled hearing of August 16, 2005, on the preliminary injunction(App. 3-4). On August 17, 2005, the wife's attorney both faxed and mailed to petitioner's attorney his proposed motion for consolidation and for a continuance of the show-cause hearing(App. 3-4).

By then, however, the time for the show-cause hearing scheduled for August 16, 2005, had passed with no hearing having taken place(App. 3).While the attorneys for the Kreppeins were communicating with each other about consolidating their clients' respective divorce actions and continuing the show-cause hearing, the wife on August 22, 2005, with her attorney's assistance, executed a "Policy Change Form" which revoked all prior beneficiary designations and named her children, the respondents, as the primary beneficiaries of her life insurance policy(App. 4;22). On August 29, 2005, First Colony received notice of the

wife's change of beneficiaries(*Id.*).

As events continued to unfold, petitioner's attorney did not receive a copy of the proposed motion for consolidation and continuance mailed by the wife's counsel until Friday, August 27, 2005, the last normal court day at the Civil District Court for the Parish of Orleans for some time(App. 3-4). Hurricane Katrina struck New Orleans and the surrounding area the following Sunday, August 29, 2005, a storm which forced both the state and federal courts in Louisiana to suspend regular operations for months(*Id.*).

On October 11, 2005, in the aftermath of Hurricane Katrina and while the state and federal courts were still not functioning, the wife died with no show-cause hearing having been held or scheduled by either petitioner or the wife(App. 4;22). Following the wife's death, First Colony received notices of proof of loss and claims for insurance proceeds from petitioner as well as from the respondents(App. 4). Because under the insurance policy, First Colony was obligated to pay the sum of $500,000, plus applicable interest, to the person rightfully entitled to these death benefits, it brought an interpleader action naming petitioner and the respondents in federal district court for the Eastern District of Louisiana on December 27, 2005, to determine the rightful beneficiaries of the insurance proceeds(App. 4;22).

After depositing the funds in the court's registry, First Colony obtained a partial summary judgment dismissing it from the suit except for the issue of its right to attorney's fees(App. 4-5;22-23). Petitioner and respondents eventually brought cross

motions for summary judgment addressing the issues of (1) the effect of the TRO on the wife's change of beneficiary of her life insurance policy; (2) the mental capacity of the wife at the time she made this change in beneficiaries; and (3) whether the change breached any contract between the wife and petitioner(App. 5-6;21).

On August 24, 2007, the federal district court, Porteous, J., granted summary to the respondents and denied petitioner's cross motion for summary judgment(App. 21-32). It determined that the wife was mentally competent when she changed the beneficiary designation on August 22, 2005; that the TRO was not in effect at the time she did so; and that she did not breach any contract with petitioner by doing so(App. 6;23-32). Reading La. Code Civ. Pro., Art. 3604(A), the motion judge ruled that a TRO, even in this divorce action, by its own terms would operate for at most ten (10) days and that it therefore expired ten days after Judge Julien signed it on August 2, 2005, or by August 12, 2005 (App. 29-30).

In addition, Judge Porteous referred to La. Code Civ. Pro., Art. 3606, and implied that petitioner in order to preserve his right to enforcement of the TRO was obligated to proceed with the application for the preliminary injunction when it came on for hearing and that upon his failure to do so, the court shall dissolve the TRO(App. 30-31). He blamed petitioner for not pursuing successfully either a consolidation of the two divorce actions or a continuance of the show-cause hearing(App. 31). As the district judge saw it on this disputed record,

> this Motion to Consolidate and Motion for Continuance was never signed by [petitioner's counsel]..., never signed by the Judge, and never filed with the Court. See Rec. Doc. No. 85-6, p. 20-21. *Therefore, the hearing date was never effectively continued.*

(*Id.*)(emphasis supplied).

Furthermore, the motion judge reasoned that even if an agreement to continue the show-cause hearing were effective, it would not have reinstated the TRO which had expired by its own terms on August 12, 2005(*Id.*). In reaching this result, Judge Porteous rejected petitioner's argument that the TRO stayed in force from its issuance on August 2, 2005, until the wife died on October 11, 2005, because this result would conflict with "well established law that a temporary restraining order should not be kept in effect for many months without making it a temporary injunction"(*Id.*).

The court of appeals affirmed the district judge on different grounds(App. 1-14). It ruled that a TRO, entered in a Louisiana *divorce* proceeding under La. Code Civ. Pro., Art. 3604(B), is not necessarily limited to just ten (10) days but rather continues in effect until the scheduled show-cause hearing on the preliminary injunction; and if the party who obtains the TRO does not proceed with the application for a preliminary injunction when it comes on for hearing, then a court is required to dissolve the TRO(App. 8-9). It found in the face of the parties' contradictory summary judgment materials that regardless of the fact that the wife wanted to consolidate their respective divorce actions and to continue the August 16th show-cause hearing, the

petitioner was to blame for the show-cause hearing not having taken place as "the...hearing...passed without any attempt by [petitioner] to prosecute his application"(App. 9).

As the court of appeals concluded, regardless of the wife's conduct----as well as the conduct of her own attorney--- in seeking an extension of this hearing, the petitioner

> never filed a motion for continuance seeking a new hearing date. And the state court never entered an order before (or even after) the August 16 hearing continuing the hearing to a later date. Accordingly, the temporary restraining order was not in effect when [petitioner's wife] later changed her beneficiary designation.

(App. 9). Because it decided that the TRO had expired, it concluded that the TRO was not entitled to *res judicata* effect(App. 14).

On November 14, 2008, the court of appeals denied the petitioner's timely filed petition rehearing *en banc*(App. 33).The petitioner now respectfully brings this petition to the Court seeking a writ of certiorari to the Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Refusal To Give Louisiana's Temporary Restraining Order The Adjudicatory Force It Deserves Under Louisiana Divorce Law Violates The Full Faith And Credit Clause, Undermines the Principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) And Permits A Spouse To Dispose Of Marital Property Before Trial Absent Judicial Order Thereby Depriving Petitioner Of Property Without Due Process of Law.

The TRO entered on August 2, 2005, by Judge Julien incident to petitioner's divorce action in the Civil District Court for the Parish of Orleans prohibiting petitioner's wife from changing the beneficiary on her life insurance policy was *never* terminated by any order of any State court, by any hearing in any State court on a preliminary injunction or by any other formal entry by any State court in the divorce proceeding prior to October 11, 2005, when petitioner's wife died. While under the plain language of La. CCP, Article 3604(A), an ordinary TRO entered in any civil action "shall expire by its terms within such time after entry, not to exceed ten days, as the court prescribes...," the terms of La. CCP, Art. 3604(B), as revised in 1980, carve out an important exception to this rule in divorce actions by providing:

> *Nevertheless*, a temporary restraining order issued in conjunction with a rule to show cause for a preliminary injunction prohibiting a *spouse* from:
>
> (1) Disposing of or encumbering community property;
>
> 2) Harming the other spouse or child; or

> (3) Removing a child from the jurisdiction of the court, in a suit for divorce *shall remain in force until a hearing is held on the rule for a preliminary injunction.*

(emphasis supplied).

La. CCP, Art. 3604(B), when read together with La. CCP, Art. 3604(A), and La. CCP, Art. 3606, makes clear that under Louisiana law, a TRO entered in a divorce proceeding does not expire by its own terms after ten (10) days—as TROs entered in other civil actions do—but rather continues "*until a hearing is held* on the rule for a preliminary injunction (emphasis supplied);"and under La. CCP, Art. 3606, petitioner's application for a preliminary injunction shall be assigned by the court "at the earliest possible time" with petitioner obligated under La. CCP, Art. 3606 to proceed with the application "when it comes on for hearing."

The record shows that Judge Julien herself apprehended correctly that no10-day rule applied to this TRO as on August 2, 2005, she scheduled the show-cause hearing on the preliminary injunction for August 16, 2005, two weeks hence(App. 39). When communication between counsel for the Kreppeins ensued with the wife wishing to consolidate her own divorce action with petitioner's action and to continue this show-cause hearing to another date, the wife on August 22, 2005, with her attorney's assistance, took advantage of her own foot-dragging conduct and executed a "Policy Change Form" which revoked all prior beneficiary designations and named respondents the beneficiaries of her life insurance policy(App.

3;4;22).

While the scheduled show-cause hearing date of August 16th passed without the hearing having been held, the wife never opposed the Civil District Court's jurisdiction to hear the divorce or to issue the TRO against her. Instead, her attorney collaborated with petitioner's counsel and with court personnel to obtain further time to prepare for the hearing and to file pleadings in the matter. There is no evidence that the wife moved for the dissolution of the TRO as was her right under Art. 3606 and Art. 3607; and there is absolutely no suggestion on this record that petitioner failed to proceed with the application for a preliminary injunction "when it comes on for hearing" as required within Art. 3606.

The court of appeals' reading of Art. 3604 together with Art. 3606 to mean that a TRO in a Louisiana divorce action to remain operative must be followed up within ten (10) days or soon thereafter with a hearing on a preliminary injunction—and if no hearing is held within that time, regardless of the reason, it *automatically* expires----misreads settled Louisiana law and nonsensically gives a spouse who postpones the show-cause hearing with her own foot-dragging conduct *carte blanche* to dispose of marital property *before* trial, dispossessing the other spouse of marital property without due process of law and absent any order by the State court allowing her to do so.

This ruling rewrites settled Louisiana law about the adjudicatory force of TROs in Louisiana divorce proceedings to the detriment of all divorce litigants. It is established law in Louisiana that a TRO in ordinary

civil actions expires within the time fixed by the court, not to exceed ten (10) days, unless extended within the time fixed for good cause shown; and a TRO ceases to exist as of the date of the hearing on the preliminary injunction. *Dauphine v. Carencro High School*, 843 So.2d 1096, 1102-1103(La. 2003). *Powell v. Cox*, 83 So.2d 908, 910(La. 1955). *Lewis v. Adams*, 679 So.2d 493, 496(La. App. 1996). *Budd Construction Co., Inc. v. City of Alexandria*, 401 So.2d 1070, 1073-1074(La. App. 1981). La. CCP, Art. 3604(A).

However, TROs issued in Louisiana divorce proceedings stand on much different ground. When issued in conjunction with a rule to show cause for a preliminary injunction prohibiting a spouse from disposing of marital property, as here, they remain in force *not* for just ten (10) days, *not* just until the show-cause hearing date itself, but rather *until a hearing is actually held* on the rule for a preliminary injunction *and no sooner*. La. CCP, Art. 3604(B). Stated another way, a TRO issued in a divorce action in Louisiana remains in full force and effect *until the State court orders otherwise* after a hearing on the preliminary injunction. *Id.*

The TRO here is no different. With no show-cause hearing on the preliminary injunction having been held by August 22, 2005, it was still in effect when the wife changed beneficiaries on that day. Because she violated its terms in doing so, her attempted change of beneficiaries is null and void and should be rescinded together with the entry of a declaratory judgment reinstating petitioner as the primary beneficiary.

Were the rule otherwise, spouses seeking to avoid a prohibition against disposing of marital property could simply wait out any10-day period or let the show-cause hearing date itself pass without a hearing by feigning cooperation with the opposing spouse to reach some kind of compromise or continuance, all the while engineering a result which postpones the hearing and leaves them free to dispose of marital property in the interim without any need for a court order allowing them to do so.

This is precisely what occurred here and what the decision below encourages, all contrary to settled Louisiana divorce law. The wife and her counsel foot-dragged their way to a postponement of the show-cause hearing while she changed beneficiaries on her life insurance policy to petitioner's detriment, in violation of the still-operative TRO and without any court order allowing her to do so. The federal courts' ratification of this illegal behavior, conduct unmistakably contumacious under Louisiana divorce law and in derogation of the property rights of the opposing spouse under Louisiana law, violates the Full Faith and Credit Clause, undermines the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64(1938), and permits a spouse to dispose of marital property absent court order and in violation of petitioner's due process rights.

Because no show-cause hearing was ever held within the meaning of La. CCP, Art. 3604(B), the adjudicatory power of the TRO remained in full force throughout petitioner's divorce proceeding up to and including October 11, 2005, when the wife passed away. Art. 3604(B). Her death during the pendency of petitioner's divorce action left intact the unchallenged

and still-operative TRO prohibiting either of them from disposing of marital property. *Succession of Bonnecaze*, 149 So.2d 663, 666(La. App. 1963). Without any appeal of its terms by the wife and without any opposition to its entry---in fact, the wife acceded to its terms----the TRO became part of the transactions between these parties which have "a force equal to the authority of things adjudged." *Id.* at 667. La. Rev. St. 13.4231(1)("Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent: (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment."). See and compare *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 444-445(1974).

As part of the transactions in petitioner's divorce action which have "a force equal to the authority of things adjudged," *Succession of Bonnecaze*, 149 So.2d at 667, the unchallenged and still-operative TRO prohibiting the wife from alienating marital property is *res judicata* and deserved to be enforced in its entirety. The court of appeals' decision to the contrary undermines this Court's decisions on the Full Faith and Credit Clause as well as its expressed notions about when preclusion should operate to bar relitigation of claims or issues.

In the first place, under the Full Faith and Credit Act, 28 U.S.C. § 1738, the "judicial proceedings of any court of any such State shall have the same full faith and credit in every court in the United States...as

they have by law or usage in the court of such State...from which they are taken." Under the statute, a federal court which is asked to recognize a state court judgment is obligated to give the same preclusive effect to that judgment as would the courts of the rendering state. *Migra v. Warren City Sch. Dist.*, 465 U.S. 75, 81(1984). *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482(1982). *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 & n. 9(1982).

Thus given the jurisdiction of the Louisiana state courts to render this TRO, if the State courts would not entertain a collateral attack on its terms, neither should a federal district court hearing the same controversy in diversity, pendent or supplemental jurisdiction. See *Johnson v. Muelburger*, 340 U.S. 581, 587(1951). After all, the ultimate touchstone for applying preclusion principles is fairness and equity, *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 329, 331 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 334(1971); and if there is no reason to doubt the quality, extensiveness or fairness of the procedures followed in the prior State court litigation, then collateral estoppel/preclusion should apply to bar relitigation. Wright, Miller & Cooper, 18 *Federal Practice and Procedure*, Jurisdiction § 4423 at 53(2d ed. 1999).

Conversely, just as a federal district court may not enforce a State court judgment entered in violation of a party's due process rights, its refusal to apply appropriate preclusion principles which results in dispossessing a party of his legitimate ownership of marital property operates to deny that party his due

process rights in federal court. See *Kremer*, 456 U.S. at 482-483. This Court has the responsibility in its superintendency role over the federal courts and the federal system to formulate the controlling rules for hearings and proof which precede the entry of final judgments and dismissals in order that those rules of procedure provide all of the parties with due process in their reach and result. *Klapprott v. United States*, 335 U.S. 601, 611 (1949) (Black, J.) citing *McNabb v. United States*, 318 U.S. 332, 341(1943).

Similarly, *Erie* mandates that a federal court sitting in diversity jurisdiction in this suit apply the substantive law of Louisiana, the forum State, in order to decide the rights of the parties absent a federal statutory or constitutional directive to the contrary. *Salve Regina College v. Russell*, 499 U.S. 225, 226(1991). "The nub of the policy that underlies *Erie*...is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Ferens v. John Deere Co.*, 494 U.S. 516, 524 (1990).

Yet the court of appeals failed in this fundamental duty. Creating judge-made common law at odds with the substantive law of Louisiana in order to reach a particular result, the federal courts below have overreached in their refusal to give the Louisiana TRO the adjudicative force it deserves under Louisiana divorce law; they have refused without reason to give this TRO the preclusive effect it warrants in this diversity action; and they have enabled the dispossession of marital property without hearing or court order and thereby denied petitioner property

without due process of law.

This refusal by the federal courts to apply preclusion principles is especially troublesome and violates notions of comity when its ruling meddles with, indeed overturns, established norms, expectations and principles of Louisiana practice and procedure with respect to divorce and marriage dissolution proceedings, matters peculiarly within the province of State jurisprudence. See *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418-419(1957); *Sutton v. Leib*, 342 U.S. 402, 406-410 (1952); *Johnson v. Muelburger*, 340 U.S. at 585-588.

In the end, as a matter of State law, the operative TRO, never challenged or diminished in State court, never lost its "adjudicatory power" to control the conduct of the wife and renders her attempt to change the beneficiary of her life insurance policy a nullity. The ensuing State court judgment in the wake of the wife's death on October 11, 2005, encompassed this TRO and deserved to be enforced in the federal proceeding under established preclusion principles, reinforced by an ordinary application of *Erie* principles. See *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 500-506(2001).

2. The Federal Courts Below Abused Summary Judgment Procedure By Weighing Evidence and Finding Facts In Order to Dispose of the Triable Fact Question Of Whether Petitioner's Wife Engineered A Postponement of the Preliminary Injunction Hearing So That She Could Dispose of Marital Property Before Trial, Denying Petitioner the Jury Trial Guaranteed Him by the Seventh Amendment On This Crucial Fact Issue.

The seventh amendment to the federal constitution provides that in suits at common law, "the right of trial by jury shall be preserved...." As Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306(2004), the right to a jury trial in civil cases is no mere procedural formality but rather a fundamental "reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320(H. Storing ed. 1981). This guaranty of a jury trial in the Constitution and the common law traditions it entrenches "do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381.

Since one of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on material issues in controversy, the summary judgment procedure now contained in Fed. R. Civ. P. 56 does not violate a party's constitutional right to a jury trial because it is presumed that if the entry of summary judgment is appropriate, there are no genuine issues of material fact for trial and therefore no right to a jury trial is implicated. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320(1902). See also *Pease v.*

Rathbone-Jones Eng. Co., 243 U.S. 273, 278-279(1917).

However, both federal jurists and legal commentators have noted that federal trial judges regularly overuse summary judgment in order to take triable cases away from juries. Hon. W.G. Young, *Vanishing Trials–Vanishing Juries–Vanishing Constitution*, 40 Suffolk U. Law Rev. 67, 78 (2006). Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066;1071-1072;1133-1134(2003). As Professor Miller observes, Rule 56's "paper trials" of crucial, disputed fact issues

> would be an unfortunate break with the past. Our civil dispute resolution system has always preferred adjudication based on oral testimony in open court subject to cross examination....[T]hey are considered aspects of what often is referred to as a "day in court," with due process embracing notions of a fair trial before an impartial tribunal.

Id. at 1072 & n. 476, citing *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209(1958)("There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case."). See also Thomas, Suja A., *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 143-144;158-160;177-178(2007).

This overuse of summary judgment has been documented. One scholar concludes that federal courts routinely weigh evidence, draw inferences in favor of the moving party and make credibility determinations. McGinley, Ann C., *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 229(1993). Likewise, it was found that courts often reject the plaintiffs' attempts to create inferences of intent and motive through a totality of circumstantial evidence, thereby creating a triable issue, by treating the evidence in a piecemeal fashion, isolating and rejecting as insufficient each of the discrete elements of the plaintiffs' evidence rather than considering their cumulative effect. *Id.* at 233-236.

Such is the case here. First, on a disputed record about why petitioner did not pursue the scheduled show-cause hearing on August 16, 2005, or bring a motion for a continuance, the district judge blamed petitioner—*not* the wife or the respondents who engineered this postponement of the show-cause hearing--- for not pursuing successfully a continuance of the show-cause hearing(App. 31). As the district judge saw it on this disputed record,

> this Motion to Consolidate and Motion for Continuance was never signed by [petitioner's counsel]..., never signed by the Judge, and never filed with the Court. See Rec. Doc. No. 85-6, p. 20-21. *Therefore, the hearing date was never effectively continued.*

(*Id.*)(emphasis supplied).

Next, the court of appeals improperly resolved in respondents' favor the same crucial fact question of whether they together with the wife engineered the postponement of the scheduled hearing on the preliminary injunction so that they could claim freedom from a court order prohibiting them from changing beneficiaries for the wife's insurance policy. It found in the face of the parties' contradictory summary judgment materials that regardless of the fact that the wife wanted to consolidate their respective divorce actions and continue the August 16th show-cause hearing, *only the petitioner was to blame for the hearing not taking place* as "the ... hearing...passed without any attempt by [petitioner] to prosecute his application"(App. 9).

As the court of appeals concluded, regardless of the wife's conduct----as well as the conduct of her own attorney--- in seeking an extension of this hearing, the petitioner

> never filed a motion for continuance seeking a new hearing date. And the state court never entered an order before (or even after) the August 16 hearing continuing the hearing to a later date. Accordingly, the temporary restraining order was not in effect when [petitioner's wife] later changed her beneficiary designation.

(App. 9).

However, this was an inquiry not just about the petitioner but about the state of mind of the wife, her intentions in seeking with the respondents to sabotage

a valid court order by her foot-dragging conduct, and whether her actions in seeking a consolidation and a continuance of the show-cause hearing amounted to a waiver of any claim on her part that the TRO was not fully operative at all relevant times. Petitioner deserves a trial by a judge or jury on these crucial fact questions and denying him this opportunity was both unfair and unconstitutional.

This abuse of Rule 56 procedure justifiably invokes this Court's power of superintendency over the federal courts to reassert their proper role in deciding summary judgment motions, i.e., reaffirming the holdings of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151(2000) and *Anderson v. Liberty Lobby,* 477 U.S. 242, 249-255(1986) which require them to draw all reasonable inferences in favor of the party who opposes the motion for summary judgment which was ultimately granted and to refrain from making any credibility determinations in order to resolve material factual disputes because this is a function of a jury, not a judge. See *Beard v. Banks*, 548 U.S. ___,___(2006)(Ginsburg, J., dissenting).

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit and, ultimately, to vacate that judgment and remand the matter to the United States District Court for the Eastern District of Louisiana with instructions that a judgment enter granting petitioner's own motion for summary judgment and declaring that the attempt by petitioner's wife to change the beneficiaries of her life

insurance policy was prohibited by the TRO of August 2, 2005, is null and void for that reason and that petitioner continues to be the named primary beneficiary under the wife's will with all the rights appurtenant thereto; or provide petitioner such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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No. 08-30409 Summary Calendar
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FIRST COLONY LIFE INSURANCE COMPANY,
Plaintiff - Appellee
v.
ALFRED J KREPPEIN, JR,
Defendant - Appellant
v.
RYAN BRICE CRANE; LAUREL CRANE LUQUETTE,
Defendants - Appellees

October 16, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the Eastern District of Louisiana. No. 2:05-CV-6849.

JUDGES: Before KING, DENNIS, and OWEN, Circuit Judges.

OPINION

PER CURIAM: *

Alfred Kreppein, Jr. appeals the district court's judgment against him in an interpleader action filed to determine who was the lawful beneficiary (or beneficiaries) under a life insurance policy issued in the

name of Stephanie Kreppein. For the reasons provided below, we affirm.

I. BACKGROUND

Stephanie Kreppein and Alfred Kreppein, Jr. were married in November 2000. According to Mr. Kreppein, he and his wife were accumulating large amounts of debt on real estate investments and, therefore, decided to purchase life insurance policies to protect each other in the event of the death of one of them. In or around November 2002, Mr. Kreppein contacted Terry Sullivan--a friend of the Kreppeins and an insurance broker--who then assisted the Kreppeins in purchasing separate life insurance policies from First Colony Life Insurance Company ("First Colony"). Mrs. Kreppein's insurance policy, issued on February 3, 2003, was a term life insurance policy for $ 500,000. Mr. Kreppein was named the primary beneficiary and Mrs. Kreppein's children from another marriage--Ryan Brice Crane and Laurel Crane Luquette--were named contingent beneficiaries.

In May 2005, Mrs. Kreppein was diagnosed with terminal brain cancer. On July 28, 2005, Mrs. Kreppein moved from her marital home in New Orleans, Louisiana to Baton Rouge in order to live with her mother.[1] On July 29, 2005, a withdrawal of approximately $ 140,000 was made from the Kreppeins' joint bank account in a Baton Rouge branch office. On or about that same day, Mr. Kreppein was advised by Sullivan that an attorney purporting to represent Mrs. Kreppein requested that the named beneficiary of Mrs. Kreppein's life insurance policy be changed.

Although Mr. Kreppein felt that Mrs. Kreppein was mentally incompetent and was not acting of her own accord, in order to protect his property, Mr. Kreppein filed a petition for divorce in the Civil District Court for the Parish of Orleans, State of Louisiana, on August 2, 2005. As part of the pleadings, Mr. Kreppein included a proposed temporary restraining order, which was signed and executed by the state court that same day. The temporary restraining order prohibited Mrs. Kreppein from "alienating, encumbering, or disposing of any or all of the assets of the community . . . or from changing the ownership and/or beneficiaries of any policies of life insurance . . . ." A show-cause hearing was set in the order for August 16, 2005, to determine whether a preliminary injunction should be issued. The order was served on Mrs. Kreppein on August 12, 2005. And, shortly thereafter, Mrs. Kreppein filed her own petition for divorce with the same court.

The August 16 show-cause date passed without a hearing; a preliminary injunction never issued; a request for an extension of the temporary restraining order was never made; and the hearing was never rescheduled. The reason for inaction is in dispute. However, the undisputed record evidence at least shows that: (1) on or about August 13, 2005, the Kreppeins' respective attorneys agreed to consolidate their cross-petitions for divorce into a single action and to continue the August 16 hearing; (2) on August 17, 2005, Mrs. Kreppein's attorney both faxed and mailed Mr. Kreppein's attorney a proposed motion for consolidation and a continuance; and (3) the proposed motion was never filed with the state court. Mr. Kreppein also offered evidence that his attorney did not receive the mailed copy of the proposed motion until

Friday, August 27, 2005, which was the last normal court day for a number of weeks because Hurricane Katrina struck the New Orleans area on August 29, 2005.

Meanwhile, on August 22, 2005, Mrs. Kreppein executed a "Policy Change Form," which purported to revoke all prior beneficiary designations and designate her children, Crane and Luquette, as the primary beneficiaries of her life insurance policy. First Colony acknowledged receipt on August 30, 2005. On October 11, 2005--without any further action ever having been taken with respect to the temporary restraining order--Mrs. Kreppein died.

Following her death, First Colony received notices of proof of loss and claims for insurance proceeds from both Crane and Luquette and Mr. Kreppein. On December 27, 2005, therefore, it filed an interpleader action in federal district court against Mr. Kreppein, Crane, and Luquette pursuant to Rule 22 of the Federal Rules of Civil Procedure to determine who was the rightful beneficiary (or beneficiaries) under Mrs. Kreppein's life insurance policy. First Colony alleged that it was "a mere stakeholder" with "no beneficial interest in the death benefits" and that it could not "make payment of the death benefits without incurring the risk of" multiple adverse judgments.

Upon order of the district court, on January 17, 2006, First Colony deposited the insurance proceeds into the court's registry. On January 23, 2006, Crane and Luquette filed their joint answer and counterclaims, and on January 30, 2006, Mr. Kreppein filed his answer and counterclaims. Thereafter, First Colony moved for

summary judgment, which was granted in part (with respect to liability) on January 25, 2006.[2]

On April 25, 2007, Mr. Kreppein sought to amend his pleadings. In his proposed counterclaims, Mr. Kreppein alleged that he was entitled to the insurance proceeds from Mrs. Kreppein's life insurance policy because Mrs. Kreppein was enjoined by the state court's temporary restraining order from changing the beneficiary designation. In addition, for the first time, Mr. Kreppein claimed that Mrs. Kreppein's attempt to amend the beneficiary designation was null and void because she lacked mental capacity at the time and because she had entered into a mutually reciprocal agreement with him not to alter the beneficiary designations in their respective life insurance policies. Lastly, Mr. Kreppein sought to assert cross claims against Crane and Luquette and third-party claims against Mrs. Kreppein's mother and attorney.

On May 11, 2007, Crane and Luquette and Mr. Kreppein filed crossmotions for summary judgment. In their motion for summary judgment, Crane and Luquette also moved to strike Mr. Kreppein's amended cross claims and third-party claims. On June 25, 2007, the district court granted their motion to strike in part and granted Mr. Kreppein's motion to amend in part. Specifically, the district court struck Mr. Kreppein's proposed cross claims and third-party claims, but permitted the amendment of Mr. Kreppein's counterclaims. The district held that the case was limited to the: (1) question of Mrs. Kreppein's mental capacity on the day she executed the Policy Change Form; and (2) effect on Mrs. Kreppein's change of the beneficiary designation of both the state court's

temporary restraining order and the Kreppeins' alleged, mutually reciprocal contract.

On August 24, 2007, the district court entered summary judgment for Crane and Luquette. The district found that Mrs. Kreppein was mentally competent at the time she changed the beneficiary designation, the state court's temporary restraining order was not in effect at that time, and the Kreppeins did not have a mutually reciprocal agreement with respect to their life insurance policies. On March 20, 2008, the district court denied a motion for reconsideration filed by Mr. Kreppein and entered final judgment against him.

Mr. Kreppein then filed a timely notice of appeal.[3] He raises three issues, namely, whether: (1) the state court's temporary restraining order rendered Mrs. Kreppein's change of beneficiaries null and void; (2) Mrs. Kreppein lacked the capacity to change the beneficiary designation because she had a mutually reciprocal contract with Mr. Kreppein; and (3) the state court's temporary restraining order was res judicata.

II. DISCUSSION

A. Standard of Review

We review a grant of summary judgment de novo, viewing all the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *See Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000) (citations omitted). Summary judgment is proper when the evidence reflects no genuine issues of material fact and the movant is entitled to judgment as

a matter of law. FED. R. CIV. P. 56(c). "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Crawford*, 234 F.3d at 902 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). "Even if we do not agree with the reasons given by the district court to support summary judgment, we may affirm the district court's ruling on any grounds supported by the record." *Berquist v. Wash. Mut. Bank*, 500 F.3d 344, 349 (5th Cir. 2007) (citation and internal quotation marks omitted).

B. The Temporary Restraining Order

Mr. Kreppein argues that Mrs. Kreppein's attempt to change the beneficiary designation of her life insurance policy violated the express terms of the state court's temporary restraining order. He asserts that the temporary restraining order was legally valid when executed and that it remained in full force and effect throughout the divorce proceedings--under article 3604(B) of the Louisiana Code of Civil Procedure--because the Kreppeins agreed to a continuance of the August 16 show-cause hearing. Mr. Kreppein claims that the continuance was requested by Mrs. Kreppein's attorney and that the state court agreed to remove the scheduled hearing from its calendar, although it would not set a new date until pleadings were filed. Finally, because Mrs. Kreppein failed to contest the temporary restraining order's validity and Louisiana law does not favor self help, Mr. Kreppein contends that the temporary restraining order "prevented [Mrs.] Kreppein from having the requisite legal capacity to

effect a change of beneficiary, so her signature on the change form was a legal nullity."

We agree with the district court that the temporary restraining order expired before Mrs. Kreppein executed the Policy Change Form on August 22, 2005. Under Louisiana law, a temporary restraining order expires on its own terms within such time as the court prescribes. LA. CODE CIV. PROC. ANN. art. 3604(A). Ordinarily, the state court may not fix a time that exceeds ten days.[4] *See id.* However, "a temporary restraining order issued in conjunction with a rule to show cause for a preliminary injunction prohibiting a spouse from . . . [d]isposing of or encumbering community property . . . shall remain in force until a hearing is held on the rule for the preliminary injunction." LA. CODE CIV. PROC. ANN. art. 3604(B).

In such instances, "the application for a preliminary injunction shall be assigned for hearing at the earliest possible time . . . ." LA.CODE CIV.PROC.ANN. art. 3606. And "[t]he party who obtains a temporary restraining order *shall proceed* with the application for a preliminary injunction when it comes on for hearing." *Id.* (emphasis added). "If the party who obtains a TRO does not proceed with the application for a preliminary injunction when it comes on for hearing, then the court is required to dissolve the TRO." *Lewis v. Adams*, 679 So. 2d 493, 496 (La. Ct. App. 1996) (citation omitted); *see also Powell v. Cox*, 228 LA. 703, 83 So. 2d 908, 910 (La. 1955) ("[A] temporary restraining order . . . ceases to exist and its legal effectiveness is of no moment as of the date of the hearing of the rule nisi for either the granting or refusing of a preliminary injunction."); *Austin v. Currie*, 16 LA. APP. 375, 134 So. 723, 724-25

(La. Ct. App. 1931) (holding that a temporary restraining order expired on the day it was set for hearing because nothing in the record indicated that it was continued even though the parties proceeded to trial on the theory that there was an injunction in force).

In this case, the August 16 hearing to show cause why a preliminary injunction should be issued passed without any attempt by Mr. Kreppein to prosecute his application. Nor did the state court continue the August 16 hearing.[5] Mrs. Kreppein's attorney stated in her affidavit that on August 15, 2005, Meghan Hinyub, her legal assistant, "called the [c]ourt to reschedule the August 16[] hearing and was unable to obtain a new date for the hearing since the Motion to Continue had not yet been filed." Hinyub submitted an affidavit stating that she called the state court and that, although she "was unable to obtain a new date for the hearing since the Motion to Continue had not yet been filed[,]" she "was informed that, once the Motions had been filed, then a new date would be set." According to Hinyub's contemporaneous notes, it was the "clerk" of court with whom she spoke, not the state court. Regardless, Mr. Kreppein never filed a motion for continuance seeking a new hearing date. And the state court never entered an order before (or even after) the August 16 hearing continuing the hearing to a later date. Accordingly, the temporary restraining order was not in effect when Mrs. Kreppein later changed her beneficiary designation.[6]

C. The Mutually Reciprocal Contract

Mr. Kreppein argues that Mrs. Kreppein "contracted

away her right to change the insurance beneficiary when she entered into a bilateral contract for reciprocal insurance policies with [him]." In support of the alleged existence of such a contract, Mr. Kreppein relies on his own affidavit testimony that: "[Mrs. Kreppein] and I specifically agreed that the proceeds of the respective policies would reciprocally ensure each the other, in the event of death, . . . and that there would be no change regarding the insurance policies or beneficiaries." He also attempts to rely upon Sullivan's affidavit; the most relevant statement therein consisting of the comment that Mr. Kreppein "indicated that he and [Mrs. Kreppein] wanted to discuss obtaining life insurance policies that would protect each of them in the event of the death of the other." Mr. Kreppein neither submitted a copy of the alleged agreement nor alleged that the contract was in writing. Based solely on the affidavits described above and without citation to any legal authority, Mr. Kreppein argues that the alleged contract prevented Mrs. Kreppein from validly changing her beneficiary designation because one cannot "validly twice sell a car or a property after it has been sold once."

We need not consider whether the district court properly found that Mr. Kreppein failed to raise a genuine fact issue concerning the existence of a mutually reciprocal agreement because we agree with Crane and Luquette that Mr. Kreppein has not demonstrated that such a contract would alter the outcome of this case. Under Louisiana law, life insurance proceeds are considered "sui generis and therefore not subject to many traditional civilian principles." *Fowler v. Fowler*, 861 So. 2d 181, 183 (La. 2003) (explaining that the Louisiana Code of 1808

provided that insurance was foreign to the code because insurance contracts derived from common law countries and were considered a form of gambling under the French Civil Code (citation omitted)). "[T]he principle that life insurance proceeds are sui generis has led Louisiana courts for decades to look to the provisions of the policies themselves and any pertinent portions of the Insurance Code to resolve disputes concerning such policies." *Id.* at 185. The rules of contract also provide a basis for the protection of life insurance proceeds because the insurance contracts are generally interpreted as ordinary contracts. *See id.* But if nothing in the laws of insurance or contract control, the policy terms prevail. *See Jackson Nat'l Life Ins. Co. v. Kennedy-Fagan*, 873 So. 2d 44, 50 (La. Ct. App. 2004).

Here, Mrs. Kreppein's insurance policy specifically provided that the "Owner may change the designations of Owner, Contingent Owner, and Beneficiary during the Insured's lifetime. Any change is subject to the consent of an irrevocable beneficiary." This is consistent with the notion under Louisiana law that, "absent a conventional agreement, no one has the vested right to the status of a beneficiary under a life insurance contract, if the contingent event which vests such right, the death of the insured, has not occurred. Until then, the parties to the insurance contract are free to change the beneficiary, if such a change is permitted by its terms." *Id.* at 49. Although Mrs. Kreppein's life insurance policy clearly vested Mrs. Kreppein with the right to name an irrevocable beneficiary, nothing in the policy itself or the record in this case suggests that she did so. Nor is there evidence that she assigned ownership of the policy to Mr. Kreppein, which would

have had the same effect. *See Kambur v. Kambur*, 652 So. 2d 99, 103 n.4 (La. Ct. App. 1995) (citation omitted). Indeed, Mr. Kreppein seeks to diminish these facts by arguing that nothing in the record indicates that either he or Mrs. Kreppein was aware of such options.

Mr. Kreppein would have us overlook the plain meaning of the insurance policy based on the alleged existence of another contract Mrs. Kreppein entered into with a third party. He provides no legal authority for this argument. *See Jackson Nat'l Life Ins. Co.*, 873 So. 2d at 50 ("Louisiana [law] simply does not address this situation; it is therefore governed by the policy terms, which constitute the law between the parties."). And he does not respond to Crane and Luquette's contention that his allegations amount to no more than a potential breach of contract claim against Mrs. Kreppein's estate. *See id.* (holding that while a wife's succession may have claims against a husband's succession arising from a life insurance policy, the policy proceeds must be disbursed in accord with the policy language). Because Crane and Luquette were the named beneficiaries and nothing in Mrs. Kreppein's insurance policy indicates that she lacked legal capacity to change the beneficiary designation, the district court correctly awarded the proceeds to Crane and Luquette. *See Fowler*, 861 So. 2d at 186 ("[T]he beneficiary is a named individual. Thus, the right to ownership of the proceeds should devolve in accordance with the contract provisions which are clear and unambiguous.").

III. CONCLUSION

For the reasons stated above, we AFFIRM the district court's judgment.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1Mr. Kreppein claimed that Mrs. Kreppein was in fact "kidnapped" by Crane's wife and Luquette.

2The district court refused to award attorneys' fees and costs, although it later did so after additional briefing. A judgment dismissing First Colony was not entered until the final judgment was issued on March 20, 2008.

3Mr. Kreppein's notice of appeal includes the judgment in favor of First Colony. First Colony filed a brief with this court arguing that Mr. Kreppein waived any of his potential arguments against it by failing to raise them in his initial brief. Mr. Kreppein did not respond in his reply brief. We therefore agree with First Colony. *See Green v. State Bar of Tex.*, 27 F.3d 1083, 1089 (5th Cir. 1994) (citation omitted).

4Crane and Luquette argue that article 3604(A)'s ten-day limit applied to the state court's temporary restraining order in this case because life insurance proceeds are not community property. We note that this conclusion is seemingly at odds with the schedule the state court set because the temporary restraining order would have expired before the August 16 hearing. However, we need not resolve the issue because we conclude that the temporary restraining order would have expired before August 22 under either article 3604(A) or 3604(B).

5We also note that the summary judgment evidence does not support Mr. Kreppein's assertion that Mrs. Kreppein sought a continuance. Mr. Kreppein's attorney did not swear in her affidavit that Mrs. Kreppein requested the continuance. Rather, she testified that during an August 13, 2005, telephone conversation with Mrs. Kreppein's attorney she said she "would not object to a continuance of the Rules previously set for hearing on August 16, 2005." On the other hand, there is evidence that Mr. Kreppein's attorney sought the continuance because his attorney mistakenly believed that Mrs. Kreppein had not been served. On August 15, 2005, a legal assistant for Mr. Kreppein's attorney noted in the firm's "online organization system" that "I spoke with the Sheriff's office to see if M[r]s. Kreppein has been served. She has not been served and there was no problem. I spoke with Mr. Kreppein and told him that there would be no court tomorrow because she had not been served." An earlier notation that same day stated that if Mrs. Kreppein had not been served a motion for continuance should be filed.

6Our decision that the temporary restraining order expired necessarily means that it was not entitled to res judicata effect. *See* LA. REV. STAT. ANN. § 13:4232(B) (providing that judgments resulting from an action for divorce only have res judicata effect as to causes actually adjudicated); *Associates Financial Services, Inc. v. Rogell*, 449 So. 2d 526, 528 (La. Ct. App. 1984).

CIVIL ACTION NO. 05-6849 SECTION "T" (1)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

FIRST COLONY LIFE INSURANCE COMPANY

VERSUS

ALFRED J. KREPPEIN, JR., RYAN BRICE CRANE AND LAUREL CRANE LUQUETTE

March 20, 2008, Decided
March 20, 2008, Filed

JUDGES: G. THOMAS PORTEOUS, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: G. THOMAS PORTEOUS, JR.

OPINION

ORDER AND REASONS

Before the Court is a Motion for Entry of Final Judgment pursuant to FRCP 54(b) filed by Plaintiff in Interpleader, First Colony Life Insurance Company. Rec. Doc. 102. No Opposition to the Motion was filed by any other party in this action. The Motion came for hearing on September 5, 2007, without oral argument and was submitted on the briefs. The Court, having considered the arguments of the parties, the Court record, the law and applicable jurisprudence, is fully advised in the premises and ready to rule.

I. BACKGROUND

First Colony Life Insurance Company (hereinafter, "First Colony") filed this Action for Interpleader requesting an order mandating Defendants to interplead and settle amongst themselves their rights to the $ 500,000.00 life insurance policy of the decedent, Stephanie B. Kreppin. Rec. Doc. 1. All Defendants answered the Interpleader action and asserted counter-claims for statutory penalties and damages under Louisiana law. *See* Rec. Docs. 9, 10. First Colony filed a Motion for Summary Judgment arguing that it was entitled to attorney's fees and costs incurred in bringing this action and further, requested that the statutory penalties and attorney's fees sought be dismissed as a matter of law. Rec. Doc. 25. On January 25, 2007, Judge Zainey granted First Colony's Motion dismissing the counter-claims of Defendants, dismissing First Colony from any further liability, and dismissing First Colony from the action "except for the limited issue of determining entitlement to attorney's fees and costs, which will be resolved on the briefs." Rec. Doc. 57.

After furthering briefing on the issues of entitlement to the fees and costs, Judge Zainey referred the matter to United States Magistrate Shushan "in order to determine reasonable attorney's fees." Rec. Doc. 70. Magistrate Shushan issued a Report and Recommendation recommending that First Colony be awarded $ 20,161.66 in attorney's fees and costs. Rec. No. 86. Over objection by Defendant, Alfred J. Kreppin, Judge Zainey adopted that portion of the Magistrate's Report and Recommendation finding that First Colony was entitled to attorney's fees and costs. However,

Judge Zainey decreased the amount to be awarded from $ 22,108.36 to $ 10,789.66." Rec. Doc. 95.

First Colony brings this Motion arguing there is no just reason to delay the entry of final judgment relative to the granting of its Motion for Summary Judgment, and the award of attorney's fees in the amount of $ 10,789.66 should be awarded from the registry of the Court without further delay. Rec. Doc. 102.

II. LAW AND ARGUMENT

Federal Rule of Civil Procedure 54(b) provides, in pertinent part:

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim is presented in an action, whether as a claim, counter-claim, cross-claim, or third party claim, or when multiple parties are involved, the Court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

After reviewing the record, the Court finds that there is no just reason for delaying the entry of a final judgment in favor of First Colony. The Counter-claims against First Colony have been dismissed and the Court has ruled that it is entitled to its fees and costs. First Colony no longer has any role in this litigation as it has deposited the funds at stake into the registry of the Court. Further, First Colony's continued participation in this litigation for an indefinite period would certainly cause it to expend additional resources

and time for no good reason. The entry of a final judgment in favor of First Colony in this case is in keeping with the spirit of Rule 54(b), which is to avoid the possible injustice which could result from a delay in entering judgment as to fewer than all of the parties until the final adjudication of the entire case. *See* 10 Wright & Miller Federal Practice and Procedure: Civil, 23 § 2654 (2007). For these reasons, First Colony's FRCP 54(b) Motion is **GRANTED.**

Accordingly,

IT IS ORDERED that First Colony Insurance Company's Motion for FRCP 54(b) Final Judgment (Rec. Doc. 102) is **GRANTED.** The Court will enter Judgment dismissing First Colony Insurance Company and directing the Clerk of Court to disburse $ 10,789.66 from the funds held in the registry of the Court.

New Orleans, Louisiana this 20th day of March, 2008.

G. Thomas Porteous, Jr.

/s/ G. Thomas Porteous

G. THOMAS PORTEOUS, JR.

UNITED STATES DISTRICT JUDGE

CIVIL ACTION NO. 05-6849 SECTION "T" (1)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

FIRST COLONY LIFE INSURANCE COMPANY

VERSUS

ALFRED J. KREPPEIN, JR., RYAN BRICE CRANE AND LAUREL CRANE LUQUETTE

JUDGMENT

The Court has granted Co-Defendants, Ryan Brice Crane and Laurel Crane Luquette's Motion for Summary Judgment finding these Defendants are the sole beneficiaries entitled to the insurance proceeds pursuant to the policy of life insurance issued by First Colony Insurance Company to Stephanie B. Kreppein. The Court has denied Co-Defendant Alfred J. Kreppin's Motion seeking entitlement to the same proceeds as well as denied his Motion for Reconsideration of the Order granting Ryan Brice Crane and Laurel Crane Luquette's Motion for Summary Judgment.

Further, the Court has granted First Colony Life Insurance Company's Motion for FRCP 54(b) Judgment on the issue of its dismissal and its entitlement to attorney's fees and costs.

Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment is hereby entered

dismissing First Colony Life Insurance from this action and the Clerk of Court is hereby ordered to pay the sum of Ten Thousand Seven Hundred Eighty-Nine and 66/100 ($10,789.66) Dollars to First Colony Life Insurance Company as attorney's fees and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is hereby entered declaring Ryan Brice Crane and Laurel Crane Luquette as the sole beneficiaries to the death benefits of the life insurance policy issued by First Colony Life Insurance Company to Stephanie B. Kreppin.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of Court pay the remaining sum deposited into the Registry of the Court with all accrued interest to Ryan Brice Crane and Laurel Crane Luquette as recognized beneficiaries of the First Colony Life Insurance Policy insuring the life of Stephanie Boyter Kreppein.

New Orleans, Louisiana, this 20th day of March, 2008.

Filed 8/24/2007

CIVIL ACTION NO. 05-6849 SECTION "T" (1)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

FIRST COLONY LIFE INSURANCE COMPANY

VERSUS

ALFRED J. KREPPEIN, JR., RYAN BRICE CRANE AND LAUREL CRANE LUQUETTE

ORDER & REASONS

Before the Court are defendant Alfred Kreppein and defendants Ryan Crane and Laurel Luquette's Cross Motions for Summary Judgment. [Rec. Doc. No. 83, 85]. On June 26, 2007, Judge Zainey ordered the parties to proceed in this litigation with cross-dispositive motions exclusively on the issues of: 1) effect of the temporary restraining order on the change of beneficiary of the life insurance policy, 2) the mental capacity of the deceased and 3) breach of contract in changing the listed beneficiary. [Rec. Doc. No. 96] The Court, having considered the arguments of the parties, the Court record, the law and applicable jurisprudence, is fully advised in the premises and ready to rule.

I. BACKGROUND

This case surrounds a dispute over decedent Stephanie Boyter Kreppein's insurance proceeds between the decedent's ex-husband, Alfred Kreppein ("Mr. Kreppein"), and the decedent's children, Ryan Brice Crane and Laurel Crane Luquette ("Crane" and "Luquette").

The decedent and Mr. Kreppein were married in November, 2000. Subsequently, each of them purchased a life insurance policy naming the other as the sole beneficiary. Mrs. Kreppein named Crane and Luquette as Contingent Beneficiaries of her policy. (Rec. Doc. No. 25-2, p. 1). On July 28, 2005, the decedent moved out of her home with Mr. Kreppein to Baton Rouge with members of her family. (Rec. Doc. No. 85, p. 3). On August 2, 2005, Mr. Kreppein filed a petition for divorce from the decedent. Id. Subsequently, on August 29, 2005, First Colony received a Policy Change Form, signed by Mrs. Kreppein, revoking all prior beneficiary designations and designating Crane and Luquette as the Primary Beneficiaries under the Policy. (Rec. Doc. No. 25-2, p. 2). Mrs. Kreppein died on October 11, 2005.

Under the applicable policy, upon the death of the insured, First Colony became obligated to pay the sum of $500,000, plus applicable interest, to the person/s rightfully entitled to the death benefit. On December 27, 2005, Plaintiff First Colony Life Insurance Company ("First Colony") filed a Complaint for Interpleader (Rec. Doc. No. 1) pursuant to Rule 22 of the Federal Rules of Civil Procedure to determine the rightful beneficiary/beneficiaries of the insurance proceeds. After depositing the funds into the registry of the court, First Colony filed a motion for summary judgment which was granted by Judge Zainey on

January 25, 2007. (Rec. Doc. No. 57). Judge Zainey dismissed First Colony from the suit, except for the limited issue of entitlement of attorney's fees and costs, which is still pending before this Court on Objection from the Magistrate's Ruling. (Rec. Doc. No. 91).

II. STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio., 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. Id. at 249-50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. See Donaghey v. Ocean Drilling & Exploration Co., 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or

depositions, to buttress his claims. Id. Hearsay evidence and unsworn documents do not qualify as competent opposing evidence. Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547, 549 (5th Cir. 1987). Finally, in evaluating the summary judgment motion, the court must read the facts in the light most favorable to the non-moving party. Anderson, 477 U.S. at 255.

Judge Zainey instructed the parties to support the cross-dispositive motions for summary judgment with evidence concerning the decedent's mental capacity, the issue of whether the decedent had "contracted away" her right to change the beneficiary on her policy, and the effect of the TRO. As such this Court will now turn to those issues.

II. CONTRACTUAL CAPACITY

Mr. Kreppein suggests that the decedent lacked the required contractual capacity at the time that she changed the beneficiary of her life insurance policy. His affidavit states that "she was unable to perform routine tasks," "she began to lose her ability to think," and "she could not remember people she had known for long periods of time." [Rec. Doc. No. 85-6]. The affidavit of the insurance agent who procured the policies for the Kreppeins states that on July 29, 2005, the decedent, her mother and another woman came to see him about changing the beneficiary on the insurance policy. The agent, Terry Sullivan states "[a]t the time, it was clear that Stephanie was not able to understand or comprehend what was going on....She smiled sweetly but did not recognize me or seem to comprehend anything that I said." (Rec. Doc. No. 85-6, p. 7).

However, the decedent was not interdicted by law at the time of her death, and it is well settled that the law presumes contractual capacity. Standard Life & Acc. Ins. Co. v. Pylant, 424 So.2d 377 (La.App.2d Cir.1982). Exceptions to the presumption of capacity to contract must be shown quite convincingly and by the great weight of the evidence. First Nat. Bank of Shreveport v. Williams, 346 So.2d 257 (La.App.3d Cir.1977); Kennedy v. Bearden, 471 So.2d 871 (La.App.2d Cir.1985). Therefore, to determine whether the change of beneficiary should be nullified due to lack of contractual capacity, the Court looks to Louisiana Civil Code Article 1926:

A contract made by a noninterdicted person deprived of reason at the time of contracting may be attacked after his death, on the ground of incapacity, only when the contract is gratuitous, or it evidences lack of understanding, or was made within thirty days of his death, or when application for interdiction was filed before his death.

La. Civ. Code Art. 1926. The changing of a beneficiary under a life insurance policy is not a gratuitous contract, Martin v. Metropolitan Life Ins. Co., 516 So.2d 1227, 1229 (La. Ct. App. 2nd Cir.1987)(citing Standard Life Ins. Co. v. Taylor, 428 So.2d 1294 (La.App.3d Cir.1983); Sizeler v. Sizeler, 170 La. 128, 127 So. 388 (La.1930)); there was no application for interdiction filed before the decedent's death; and the Change of Beneficiary Form signed by the deceased was executed on August 22, 2005, more than thirty days before the decedent's death.

Therefore, the only way that the decedent's Change of

Beneficiary Form can be challenged for lack of capacity is if it "evidences a lack of understanding." There is no evidence that the contract itself "evidences a lack of understanding." The Policy Change Form bears the decedent's signature and clearly sets forth a change of beneficiary from Mr. Kreppein to a 50% interest in Ryan Crane and a 50% interest in Laurel Crane Luquette. [Rec. Doc. No. 83-8, p. 56]. Furthermore, the sworn affidavit of Mary Elizabeth Perry, who witnessed the signing of the document notes that the decedent "made it clear it was something she wanted to do. She expressed understanding concerning the implications of signing the Change of Beneficiary Designation Form." [Rec. Doc. No. 83-6, p. 41]. As such, there is insufficient evidence to overcome the presumption that the decedent had contractual capacity at the time she executed the Policy Change Form document. [1]

III. RECIPROCAL INSURANCE OBLIGATION

Mr. Kreppein argues that even if the decedent did not lack contractual capacity to change the insurance policy beneficiary, she was precluded from doing so because she and Mr. Kreppein had mutually contracted away their rights to change the beneficiary of their respective policies.

Mr. Kreppein states in his affidavit: "Stephanie and I had specifically agreed to secure two insurance policies on each other's lives to enable us to pay debts which we were continuing to incur as a result of business and other property we purchased during our marriage." (Rec. Doc. No. 85-6, p. 3). The two allegedly agreed that the proceeds of the respective policies would

reciprocally ensure each other and there would be "no change regarding the insurance policies or beneficiaries." Id.

The only evidence that Mr. Kreppein has to attest to this seemingly oral agreement to reciprocally insure was Mr. Kreppein's own affidavit and that of Terry Sullivan, the agent who helped the Kreppeins procure their policies. Terry Sullivan states in his depositions: "Al was aware that I had an insurance license and he indicated that he and Stephanie wanted to discuss obtaining life insurance policies that would protect each of them in the event of the death of the other." (Rec. Doc. No. 85-6, p. 6).

The decedent's insurance policy states that the "Owner may change the designations of Owner, Contingent Owner, and Beneficiary during the insured's lifetime. Any change is subject to the consent of an irrevocable beneficiary." (Rec. Doc. No. 83-8, p. 35). There is no indication in the policy nor any argument made by either party that Mr. Kreppein was made an "irrevocable beneficiary" under the policy. Without a designation of an irrevocable beneficiary, the decedent would be free to change the beneficiary under the policy at any time before his or her death. If the Kreppeins had truly intended to contract out of their right to change the designation of beneficiary, each should have designated the other as "irrevocable beneficiary" under the policy.

If they had done so, any change to the policy beneficiary could only be made with the irrevocable beneficiary's consent. It is well settled in Louisiana law that the owner of an insurance policy, usually also the

insured, has the right to change the designation of the beneficiary of his or her policy under the terms of the policy without the consent of the original beneficiary. 15 La. Civ. L. Treatise, Insurance Law & Practice § 256 (3d ed.). This is because absent a conventional agreement, "no one has the vested right to the status of a beneficiary under a life insurance contract, if the contingent event which vests such right, the death of the insured, has not occurred; until then, the parties to the insurance contract are free to change the beneficiary, if such a change is permitted by its terms." Jackson Nat. Life Ins. Co. v. Kennedy-Fagan, 873 So.2d 44, 49 (La. Ct. App. 1st Cir. 2004).

Such a case is present here. Mr. Kreppein has adduced no evidence that the deceased sought to designate him as an irrevocable beneficiary. Furthermore, he has failed to introduce any evidence, other than his own testimony and the generalized testimony of his insurance agent, Terry Sullivan, that the deceased intended to enter into a binding conventional obligation to maintain Mr. Kreppein as the beneficiary of her policy.

IV. EFFECT OF THE TEMPORARY RESTRAINING ORDER

Mr. Kreppein's third basis for requesting this Court deem the decedent's Change of Beneficiary ineffective is the existence of a temporary restraining order (TRO) that he argues was in effect at the time of the change of beneficiary that would apply to the First Colony life insurance policy. The TRO in question was signed by Judge Ethel Simms Julien on August 2, 2005. The TRO states:

[the] temporary restraining orders issue directed unto the defendant, Stephanie Boyter Kreppein, restraining, enjoining and prohibiting Stephanie Boyter Kreppein, or any other persons, entities, firms, corporations or partnerships acting or claiming to act in Stephanie Boyter Kreppein's behalf from in any manner whatsoever alienating, encumbering or disposing of any or all of the assets of the community of aquets and gains between them; and, from borrowing against the cash surrender values, or from changing the ownership and/or beneficiaries of any policies of life insurance insuring the lives of either of the parties hereto, all without bond.

Rec. Doc. No. 85-6, p. 16. The TRO further orders Stephanie Boyter Kreppein to show cause on the 16th of August, 2005 why a preliminary injunction should not be issued, why she should not return the funds removed from community and separate bank accounts, and for all other equitable relief to which Mr. Kreppein is entitled. Id.

The Louisiana Code of Civil Procedure provides the procedure for obtaining a temporary restraining order. La. Code Civ. Pro. Art. 3604. There is no disputed fact as to whether or not the TRO was validly issued in this case. The TRO was properly endorsed, signed by the Judge, filed by the Court, and otherwise met the requirements of Article 3604. However, the issue that is in dispute is whether or not the TRO was still in effect at the time Mrs. Kreppein changed the beneficiary of her life insurance policy, and whether that TRO, if still in effect, extended to the life insurance policy.

The Code also provides that a TRO shall expire by its terms within such time after entry, not to exceed ten days. La. Code Civ. Pro. Art. 3604. (emphasis added). In this case, the TRO was signed by the Judge on August 2, 2005, and served on Mrs. Kreppein on August 12, 2005.

A TRO is considered effective against the parties from the time that they receive actual notice of the order, by personal service or otherwise. La. Code Civ. Pro. Art. 3605. (emphasis added).

Mr. Kreppein argues that Mrs. Kreppein was served with the notice of the TRO on August 12, 2005, and therefore, that is when the TRO took effect. As such, Mr. Kreppein argues that the TRO was effective for 10 days, and when Mrs. Kreppein attempted to change the beneficiary of her policy on August 22, 2005, she was doing so in violation of a court order.

Rec. Doc. No. 85-2, p. 4-5, Rec. Doc. No. 88, p. 3. However, the service of process of the TRO or the notice thereof does not change the length or the start date of the effectiveness of the TRO.

The date of notice or service merely serves to indicate the time at which the parties' compliance is required. Therefore, since the TRO could be in effect no longer than 10 days after entry, the TRO expired by its own terms on August 12, 2005, the day that it was served on Mrs. Kreppein.

Furthermore, the August 16, 2005 Rule to Show Cause came and went without a hearing on the matter. Article 3606 states: The party who obtains a temporary

restraining order shall proceed with the application for a preliminary injunction when it comes on for hearing. Upon his failure to do so, the court shall dissolve the temporary restraining order. La. Code Civ. Pro. Art. 3606. See also, Austin v. Currie, 134 So. 723 (La. Ct. App. 2d. Cir. 1931)(temporary restraining order, where not extended, expired on date fixed to show cause why preliminary injunction should not issue).

There is some evidence that the parties intended to request a continuance from the Court for their hearing on the preliminary injunction. See Rec. Doc. No. 85-6, p. 20-21. However, this Motion to Consolidate and Motion for Continuance was never signed by Sandra S. Salley, counsel for Mr. Kreppein, never signed by the Judge, and never filed with the Court. See Rec. Doc. No. 85-6, p. 20-21. Therefore, the hearing date was never effectively continued.

Furthermore, even if the Court were to consider the agreement to continue effective, the agreement continued the hearing date on the preliminary injunction but did not reinstate the TRO which had already expired. Plaintiff's argument that the TRO stayed in effect from its issuance on August 2, 2005 until the decedent's death on October 11, 2005 is clearly in contrast to well established law that a temporary restraining order should not be kept in effect for many months without making it a temporary injunction. Metalock Repair Service v. Harman, 1954, 216 F.2d 611 (6th Cir. 1954).

Accordingly,

IT IS ORDERED that the Motion for Summary

Judgment filed on behalf of Ryan Brice and Laurel Crane Luquette be GRANTED.

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed on behalf of Alfred J. Kreppein, Jr. be DENIED.

Footnote

1 It is also noteworthy that on July 11, 2007, Judge Kern A. Reese of the Civil District Court for the Parish of Orleans, in an extensive Reasons for Judgment held that Mr. Kreppein did not overcome the presumption of testamentary capacity in his challenge to the decedent's revocation of Mr. Kreppein as the executor of her will. See Rec. Doc. No. 99, Written Reasons of Judgment in the Succession of Stephanie Boyter Kreppein. That court, while determining the decedent's capacity in revoking a testament, which took place on a different occasion than the Change of Beneficiary, examined much of the same evidence that is before this Court and likewise found it insufficient to overcome the heavy burden placed on those seeking to nullify a testament.

G. Thomas Porteous, Jr.
UNITED STATES DISTRICT JUDGE

11/14/2008

No. 08-30409 Summary Calendar

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FIRST COLONY LIFE INSURANCE COMPANY,
Plaintiff - Appellee

v.

ALFRED J KREPPEIN, JR,
Defendant - Appellant

v.

RYAN BRICE CRANE; LAUREL CRANE LUQUETTE,
Defendants – Appellees

Appeal from the United States District Court for the Eastern District of Louisiana. No. 2:05-CV-6849.

ON PETITION FOR REHEARING EN BANC

Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R.App.P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

2005-10347
CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

ALFRED J. KREPPEIN, JR.

VERSUS

STEPHANIE BOYTER KREPPEIN

The petition of Alfred J. Kreppein, Jr., a major resident and domiciliary of Orleans Parish, State of Louisiana, respectfully represents:

1.

Made Defendant herein is Stephanie Boyter Kreppein, who is a major resident and domiciliary of East Baton Rouge Parish, State of Louisiana who can be served with notice and citation at 12713 East Millburn Drive, Baton Rouge, Louisiana 70815.

2.

The parties hereto were married unto each other on November 17, 2000, in Jefferson Parish, State of Louisiana.

3.

The last matrimonial domicile of the parties was located at 7300 Lakeshore Drive, Unit 41, New Orleans, Louisiana 70124.

4.

This Court has jurisdiction over this proceeding pursuant to the provisions of Louisiana Code Civil Procedure, Article 10(a)(7), in that this is a suit for divorce and matters incidental thereto, and both of the spouses are domiciled in this State.

5.

Venue for this action is proper in this Court pursuant to the provisions of Louisiana Code Civil Procedure, Article 3941, as Orleans Parish is the parish where both of the parties are domiciled.

6.

As Petitioner and Defendant ceased living together and physically separated on July 26, 2005, Plaintiff seeks a judgment of divorce from the defendant pursuant to the provisions of Louisiana Civil Code, Article 102.

7.

The parties hereto have acquired community properties and have incurred community obligations.

8.

Petitioner, Alfred J. Kreppeln, Jr., fears that before a hearing can be had or notice given, the defendant, Stephanie Boyter Kreppein, will or may dispose of, alienate or encumber some or all of the assets belonging to the community of acquets and gains existing between them, and will or may borrow against the cash surrender values and/or change the ownership and/or beneficiaries of the policies of life insurance insuring the lives of the parties hereto, causing Alfred J. Kreppein, Jr. immediate irreparable injury and harm. Alfred J. Kreppein, Jr. seeks, therefore and is entitled to the issuance of a Temporary Restraining Order herein directed unto the defendant, Stephanie Boyter Kreppein, restraining, enjoining and prohibiting Stephanie Boyter Kreppein, or any other persons, entities, firms, corporations or partnerships acting or claiming to act in Stephanie Boyter Kreppein's behalf from in any manner whatsoever alienating, encumbering or disposing of any or all of the assets of the community of acquets and gains between them; and, from borrowing against the cash surrender values, or changing the ownership and/or beneficiaries of any

policies of life insurance insuring the lives of either of the parties hereto, all without bond.

9.

Petitioner seeks and is entitled to the issuance of a rule nisi herein, directed unto the defendant, Stephanie Boyter Kreppeln, ordering Stephanie Boyter Kreppeln to show cause, if any she can, on a date and at a time to be set by this Court, why a Preliminary Injunction in the form and substance of the temporary restraining order sought immediately hereinabove should not issue herein, without bond.

10.

Stephanie Boyter Kreppeln withdrew funds in the amount $142,000.00 from various bank accounts containing both community and separate funds of Petitioner, on July 28, 2005. Petitioner seeks and is entitled to the issuance of a rule nisi herein, directed unto the defendant, Stephanie Boyter Kreppein, ordering Stephanie Boyter Kreppein to show cause, if any she can, on a date and at a time to be set by this Court, why said funds should not be retumed to a community account.

11.

Petitioner seeks and is entitled to a judgment terminating the community of acquets and gains, retroactive to date of the judicial demand herein, decreeing each of the parties hereto to be owners of an undivided one-half interest In and thereto.

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Pursuant to provisions of LBA-R.S. 9:2801 et seq., Petitioner seeks and is entitled to a judgment from this Court partitioning the community of acquets and gains previously existing between the parties.

13.

Petitioner requests that this Court order the parties to

file Sworn Detailed Descriptive Lists within forty-five (45) days of service of this petition, pursuant to Louisiana Revised Statute 9:2801(1)(a) and that the parties file Traversals of the Sworn Detailed Descriptive Lists within sixty (00) days of the ding of the last Sworn Detailed Descriptive List.

WHEREFORE, Petitioner, Alfred J. Kreppein, Jr., PRAYS THAT:

A. The defendant, Stephanie Boyter Kreppein, be served with notice and citation as set forth in Paragraph 1 hereinabove;

B. The parties be ordered to file Sworn Detailed Descriptive Lists within forty-five (45) days of service of this petition, pursuant to Louisiana Revised Statute 9:2801(1)(a) and that the parties file Traversals of the Swom Detailed Descriptive Lists within sixty (60) days of the filing of the last Sworn Detailed Descriptive List.

C. A temporary restraining order issue herein directed unto the defendant, Stephanie Boyter Kreppein, restraining, enjoining and prohibiting Stephanie Boyter Kreppein and any other person, entities, claiming to act in Stephanie Boyter Kreppeln's behalf, from in any manner whatsoever alienating, encumbering or disposing of any or all assets of the community of acquets and gains previously existing between the parties hereto; from borrowing against the cash surrender values, from changing the ownership and/or beneficiaries of any policies of life insurance insuring the lives of either of the parties hereto;

D. A rule nisi issue herein directed unto the

defendant, Stephanie Boyter Kreppein, ordering her to show cause, if any she can, on a date and at a time to be set by this Court, why:

1. A preliminary injunction in the form and substance of the temporary restraining order Alfred J. Kreppein, Jr. sought hereinabove should not issue herein, without bond; and
2. Stephanie Boyter Kreppein should not return the funds removed from the bank accounts containing both community and separate funds, to a community account.

Petitioner FURTHER PRAYS that after all legal delays and due proceedings had herein, there be further judgment herein in Alfred J. Kreppein Jr.'s.favor and against the defendant, Stephanie Boyter Kreppeln:

A. Granting unto Alfred J. Kreppein, Jr. a judgment of final divorce, a vinculo matrimonii;
B. Terminating the community of acquets and gains previously existing between the parties hereto, retroactive to date of judicial demand herein, decreeing each of the parties to be owners of an undivided one-half interest in and thereto;
C. Partitioning the community of acquets and gains previously existing between the parties in accordance with provisions of LSA-R.S. 9:2801et seq.;
D. For all further equitable relief to which Alfred J. Kreppein, Jr. is entitled to in these premises.
***

ORDER

CONSIDERING THE ABOVE AND FOREGOING, IT IS ORDERED that the parties shall file Swom

Detailed Descriptive Lists of all community property,.the fair value and the location of each asset and all community liabilities, within forty-five (45) days of service of this order and that the parties shall file Traversals of the Sworn Detailed Descriptive Lists within sixty (60) days of the fling of the last Swom Detailed Descriptive List.

IT IS FURTHER ORDERED that temporary restraining orders issue directed unto the defendant, Stephanie Boyter Kreppein, restraining, enjoining and prohibiting Stephanie Boyter Kreppein or any other persons, entities, firms, corporations or partnerships acting or claiming to act in Stephanie Boyter Kreppein's behalf from in any manner whatsoever alienating, encumbering or disposing of any or all of the assets of the community of acquets and gains between them; and, from borrowing against the cash surrender values, or from changing the ownership and/or beneficiaries of any policies of life insurance insuring the lives of either of the parties hereto, all without bond,

IT IS FURTHER RDERED that Stephanie Boyter Kreppein show cause on the 16th day of August, 2005 at 8:30 am why:

1. A preliminary injunction in the form and substance of the temporary restraining order Alfred J. Kreppein, Jr. sought hereinabove should not issue herein, without bond;.
2. Stephanie Boyter Kreppeln should not return the funds removed from the community and separate bank accounts to a community account.
3. For all further equitable relief to which Alfred J.

Kreppein, Jr. is entitled to in these premises.

August 2, 2005 and it needs to show that

Judge Ethel Simms Julien

24

(2)

No. 08-1049

In The

Supreme Court of the United States

ALFRED J. KREPPEIN, JR.,

Petitioner,

v.

RYAN BRICE CRANE, LAUREL CRANE LUQUETTE and FIRST COLONY LIFE INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROY H. MAUGHAN, JR.
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INTRODUCTION

In his Petition for Writ of Certiorari, Petitioner presents no "compelling reasons" for the Court to grant his Petition ("Petition"). *See* Supreme Court Rule ("Sup. Ct. R.") 10. There are no conflicts within the circuits to be resolved in this case, and there is no important question of federal law that has yet to be settled by the Court. Additionally, according to Sup. Ct. R. 10, a Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The courts below correctly rejected Petitioner's argument. In the absence of any tension in the circuits, there is no reason to second-guess the lower court rulings here.

None of the criteria warranting this Court's review is present in this case. The questions presented are not novel or emerging. Furthermore, Petitioner's assertion that the legal consequences of the failure to obtain the continuance was unfairly placed on his shoulders seriously misrepresents well-settled statutory and case law, holding that when a Mover fails to go forward on the date set for hearing, dismissal of the TRO is the appropriate remedy. The Petition therefore should be denied.

COUNTER-STATEMENT OF THE CASE

Stephanie Kreppein ("Ms. Kreppein") and Alfred Kreppein, Jr. ("Mr. Kreppein" or "Petitioner") were

married in November, 2000. Subsequently, Ms. Kreppein, as owner, purchased a term life insurance policy with First Colony naming Mr. Kreppein as the sole, primary beneficiary. On July 28, 2008, Ms. Kreppein moved out of her home with Mr. Kreppein in New Orleans, Louisiana, and into a home with her mother in Baton Rouge, Louisiana. On August 2, 2005, Mr. Kreppein filed a petition for divorce from Ms. Kreppein under Louisiana Civil Code Article 102, which sought incidental relief in the form of a temporary restraining order ("TRO"). The TRO issued by Judge Ethel Simms on August 2, 2005 prohibited Ms. Kreppein from encumbering or disposing of certain items of community property. Additionally, a hearing was set for August 16, 2005 to determine whether a preliminary injunction should be issued. The request for preliminary injunction went without hearing on August 16, 2005 and there was no request for a continuance filed with the Court by Mr. Kreppein. Additionally, the matter was never reset on the Court's docket. Subsequently, on August 22, 2005, First Colony received a Policy Change Form, signed by Ms. Kreppein, revoking Mr. Kreppein's designation as primary beneficiary and naming in his place her children, Ryan Brice Crane ("Mr. Crane") and Laurel Crane Luquette ("Ms. Luquette"), as the primary beneficiaries of the policy. Stephanie Kreppein died on October 11, 2005.

Under Ms. Kreppein's policy, upon her death, First Colony became obligated to pay the sum of $500,000.00 plus applicable interest to Mr. Crane and

Ms. Luquette. However, First Colony Life Insurance Company ("First Colony") filed a Complaint for interpleader pursuant to Rule 22 of the Federal Rules of Civil Procedure due to Mr. Kreppein's disputed assertion that he remained primary beneficiary. After depositing the insurance proceeds into the registry of the Court, First Colony filed for summary judgment seeking its dismissal from the action. Summary Judgment was granted in its favor on January 25, 2006. Thereafter, Mr. Crane and Ms. Luquette on the one hand, and Mr. Kreppein on the other, filed cross-motions for summary judgment asserting their respective claims. On August 24, 2006, the Court granted the cross-motion for summary judgment filed by Mr. Crane and Ms. Luquette and denied the cross summary judgment motion of Mr. Kreppein, finding among other things that the TRO was not in effect when Ms. Kreppein executed the change of beneficiary designations and that Mr. Crane and Ms. Luquette were the rightful beneficiaries of the proceeds from the First Colony insurance policy.

REASONS FOR DENYING THE WRIT

1. Petitioner's assertion that the TRO was in effect on August 22, 2005 seriously misrepresents well-settled statutory and case law, therefore, his Petition should not be granted when the asserted error consists of erroneous factual findings or misapplication of properly stated rule of law.

All of the lower courts agree that the temporary restraining order ("TRO") expired before Ms. Kreppein executed the Policy Change Form on August 22, 2005. Petitioner argues that the lower court's errors consist of erroneous factual findings and misapplication of properly stated rule of law. These contentions do not warrant this Court's review as per Sup. Ct. R. 10.

The TRO signed by Judge Ethel Simms Julien on August 2, 2005 required that Mr. Kreppein proceed contradictorily on August 16, 2005 with evidence to obtain a preliminary injunction. According to Louisiana Code of Civil Procedure, Article 3603, the TRO would have expired on August 16, 2005, when the Court set the hearing on the request for preliminary injunction. The language of Louisiana Code of Civil Procedure Article 3606 is not permissive but mandatory. It states that the party obtaining the TRO **shall** proceed with the application for a preliminary injunction when it comes on for hearing. Upon his failure to do so, the Court shall dissolve the TRO. *See* LSA-C.C.P. art. 3606. Despite the mandatory language of the statute, the August 16th hearing date passed

without a hearing being conducted. The record of the Orleans Civil District Court contains no filing by any party thereafter.

LSA-C.C.P. art. 3604(A) states that a temporary restraining order expires ten days after its issuance unless extended. LSA-C.C.P. art. 3604. Nevertheless, a TRO issued in conjunction with a rule to show cause for a preliminary injunction to prohibit a spouse from disposing or encumbering *community property* remains in force until a hearing is held on the rule for the preliminary injunction. LSA-C.C.P. art. 3604. However, when a TRO is issued restraining the disposition of community property, the application for preliminary injunction must be assigned for hearing at the earliest possible time and the party who obtains the TRO must proceed with the application for a preliminary injunction on the hearing date or the TRO dissolves. LSA-C.C.P. art. 3606; *Lewis v. Adams,* 679 So. 2d 493, 496 (La. Ct. App. 1996). Therefore, if the applicant fails to proceed on the hearing date, "*the court shall dissolve the temporary restraining order*" (emphasis added). LSA-C.C.P. art. 3606. This statutory scheme is misrepresented in the Petitioner's brief where it was argued that the TRO remained in effect until a hearing is actually had, regardless of the Mover's failure to attend the hearing date prescribed by the Court issuing the TRO.

It is clear that TRO's, which are granted without notice or hearing, are not intended to be more than a very short term solution. The preliminary and permanent injunction, unlike the TRO, requires notice to

the other party and opportunity for hearing. LSA-C.C.P. art. 3602. Mr. Kreppein did not go forward with the hearing as directed on August 16th to obtain a preliminary injunction; therefore, according to the Louisiana Code of Civil Procedure, the TRO was dissolved. **Temporary restraining orders which are not extended expire on the date fixed to show cause why a preliminary injunction should not issue.** *Austin v. Currie*, 134 So. 723 (La. App. 2d Cir. 1931). This means the TRO, as it pertains to the alienation of community property, was only in effect from August 2 through August 16, 2005 at the longest.

Despite Petitioner's suggestion that a continuance had been obtained on the hearing for the preliminary injunction which acted to extend the date the TRO would expire, each of the lower courts noted, a Motion for Continuance was never filed by Mr. Kreppein. (Pet. App. 9a; 31a). In fact, the record does not contain any evidence to support the claim that a continuance of the August 16 hearing date was obtained. Therefore, the lower courts' conclusion that the TRO was not in effect on August 22, 2005 when Ms. Kreppein changed the beneficiary on the First Colony Life Insurance Policy was correct. Furthermore, Petitioner asserts that the Court of Appeals' reading of LSA-C.C.P. art. 3604 together with LSA-C.C.P. art. 3606

> misreads settled Louisiana law and nonsensically gives a spouse who postpones the show-cause hearing with her own foot-dragging conduct carte blanche to dispose of

> marital property before trial, dispossessing the other spouse of marital property without due process of law and absent any order by the State court allowing her to do so.

(Pet. App. 16). Petitioner asserts that Ms. Kreppein and her counsel "foot-dragged their way to a postponement of the show cause hearing while she changed beneficiaries on her life insurance policy to Petitioner's detriment, in violation of the still-operative TRO and without any court order allowing her to do so." (Pet. App. 18). However, TRO's are granted to the moving party without notice to the party against whom the order is directed and without opportunity for hearing. The applicant of the TRO can extend or postpone the date of the hearing for good cause, **with or without** the consent of the party against whom the order is directed. *See* LSA-C.C.P. art. 3604. Therefore, it was not necessary for Ms. Kreppein or her attorney to consent to an extension of the TRO and Petitioner was free to protect himself from the expiration of the order on August 16, 2005 by simply requesting an extension of the TRO. With an ex parte motion, Petitioner could have extended the application of the TRO, if he chose to do so. As both courts noted, a Motion for Continuance was never filed by Mr. Kreppein. (Pet. App. 9a; 31a). Therefore, both courts properly concluded that the TRO was not in effect on August 22, 2005 when Ms. Kreppein changed the beneficiary on the First Colony Life Insurance Policy and Ms. Kreppein and her attorney could not "foot drag" their way to a postponement of the

show-cause hearing by feigning cooperation without the Mover's acquiescence.

2. Petitioner's assertion that the legal consequences of the failure to obtain the continuance was unfairly placed on his shoulder seriously misrepresents well-settled statutory and case law, which holds that when a Mover fails to go forward on the date set for the hearing for the injunction, dismissal of the TRO is the appropriate remedy, therefore, not warranting this Court's review as per Sup. Ct. R. 10.

Mr. Kreppein next argues that the consequence of the failure to obtain the continuance was unfairly placed on his shoulders when the Judge blamed the Petitioner ("Husband") – not the wife, who supposedly "engineered the postponement of the scheduled hearing on the preliminary injunction so that they (sic) could claim freedom from a court order prohibiting them from changing beneficiaries for the wife's insurance policy." (Pet. App. 26). The consequences arising out of the failure to obtain the continuance were attributed to the Petitioner ("Husband") because he was the "Mover" or the party seeking the injunction. It was the husband's motion that was unsupported by his absence on August 16, 2005. The burden is on the party who obtains the TRO to proceed with the application for a preliminary injunction when it comes on for hearing, and upon his failure to do so,

the Court was obligated to dissolve the TRO. *See* LSA-C.C.P. art. 3606.

3. Petitioner's assertions that the federal courts' actions violated the Full Faith and Credit Clause is entirely unfounded because the lower courts followed and applied well-settled Louisiana state laws relative to *Res Judicata*, therefore, not warranting this Court's review as per Sup. Ct. R. 10.

In his Petition, Mr. Kreppein states that the federal courts' actions violated the Full Faith and Credit Clause, undermining the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), implying that the outcome of this matter would be different had it been decided in state court. (Pet. App. 19). Petitioner's contentions are entirely unfounded. The district court and the Fifth Circuit followed and applied well-settled Louisiana state laws but concluded Res Judicata and/or preclusion did not apply because the incidental relief sought in the divorce had been abandoned.

Furthermore, *Res Judicata* is codified in Louisiana Civil Code of Procedure Article 425, titled "Preclusion by Judgment" as well as in LSA-R.S. 13:4231, titled "Res Judicata" and LSA-R.S. 13:4232, titled, "Exceptions to the general rule of res judicata." Louisiana Code of Civil Procedure Article 425 states:

> A. A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation.
>
> B. Paragraph A of this Article shall not apply to an action for divorce under Civil Code Article 102 or 103, an action for determination of incidental matters under Civil Code Article 105, an action for contribution to a spouse's education or training under Civil Code Article 121, and an action for partition of community property and settlement of claims between spouses under R.S. 9:2801.

LSA-R.S. 13:4232, Exceptions to the general rule of res judicata, states:

> A. A judgment does not bar another action by the plaintiff . . .
>
> B. In an action for divorce under Civil Code Article 102 or 103, in an action for determination of incidental matters under Civil Code Article 105, in an action for contribution to a spouse's education or training under Civil Code Article 121, and in an action for partition of community property and settlement of claims between spouses under R.S. 9:2801, the judgment has the effect of res judicata only as to causes of action actually adjudicated.

The Louisiana state court proceeding filed by Mr. Kreppein sought a divorce in accordance with Louisiana Civil Code Article 102. Mr. Kreppein's Petition

was styled as a "Petition For Divorce Pursuant to Louisiana Civil Code Article 102 and Determination of Incidental Matters." Therefore, pursuant to LSA-C.C.P. art. 425 and LSA-R.S. 13:4232, *res judicata* or *preclusion by judgment* does not apply to divorce proceedings brought under Louisiana Civil Code Article 102 unless the matter is actually adjudicated. Additionally, *res judicata* or *preclusion by judgment* does not apply to any determination of incidental matters in divorce proceedings, such as injunctive relief pursuant to Louisiana Civil Code Article 105. Therefore, *res judicata* is inapplicable to the case at issue.

4. According to well-settled Louisiana case law, the TRO in this case, had no application to the proceeds of the First Colony Life Insurance Policy because it was not community property, therefore, in essence, Ms. Kreppein was never legally precluded from executing the Change of Beneficiary Designation, therefore, Petitioner attempts to identify an issue meriting this Court's attention, but, seriously misrepresents well-settled Louisiana statutory and case law and therefore Petitioner's Writ should be denied.

A TRO that is issued without notice to the other party or opportunity for hearing is not considered a final adjudication of the facts determining ownership or classification of property as community or separate. The TRO awarded under Louisiana Code of Civil Procedure Article 3604 only applies to "assets of the

community" and proceeds of a life insurance policy are not community property. LSA-C.C.P. art. 3604 allows for TRO's to remain in effect beyond the customary 10 day expiration period until a hearing is held on the rule for a preliminary injunction when the TRO prohibits "disposing of or encumbering *community property*" (emphasis added). LSA-C.C.P. art. 3604. Otherwise it expires on its face on the 10th day following its issuance. In summary, if the TRO restrained disposition of Ms. Kreppein's separate property, it expired ten (10) days after issuance. If it applied to community property, it could remain in effect until the date the hearing is set on the preliminary injunction, which in this case was August 16, 2005. In either case, the TRO would have expired on August 22, 2005 when the Change of Beneficiary Form was executed.

Additionally, respondents maintain that the TRO had no application to the First Colony policy because the proceeds of a life insurance policy, which is not payable to the insured's estate, is not a community asset. *Fowler v. Fowler*, 861 So. 2d 181 (La. 2003). Louisiana law has consistently recognized a clear distinction between ownership of a life insurance policy (and the benefits thereof during the insured's life) and the ownership of the death benefits or proceeds of the policy. *Jackson National Life Ins. Co. v. Kennedy-Fagan*, 873 So. 2d 44 (La. App. 1st Cir. 2004). Recall that Ms. Kreppein changed beneficiaries on August 22, 2005, not ownership of the policy.

This distinction between the right to change ownership and the right to change beneficiaries was further emphasized by Louisiana's Fourth Circuit Court of Appeal in *Succession of Jackson*, 402 So. 2d 753 (La. App. 4th Cir. 1981). Under circumstances very similar to those in our case, Jackson, who had separated from his wife, Dorothy Gray Jackson in November of 1976, had acquired several life insurance policies during the marriage. During the course of the separation proceedings the trial court issued a preliminary injunction against both of the Jacksons ordering them not to dispose of community property. In February of 1979, Mr. Jackson obtained a Haitian divorce from Dorothy Jackson and married Elaine Mead Jackson. Mr. Jackson thereafter changed the beneficiary on the life insurance policies from Dorothy Jackson to Elaine Jackson. Mr. Jackson died on September 25, 1979, with Elaine Jackson still named as beneficiary.

At the time Mr. Jackson executed the change of beneficiary designation, a preliminary injunction restraining him from disposing of the community property was still in effect. Dorothy Jackson contended that the act of changing beneficiaries on the policy was in violation of the injunction and thus invalid. However, the Fourth Circuit held that the proceeds of a term policy acquired during the existence of the community is not a community asset and thus did not come within the scope of the injunction which protected the community property. The Court stated that the ownership of a policy of life insurance, whether it is separate or community property, is

determined by the marital status of the owner at the time the policy is issued. *Succession of Jackson*, 402 So. 2d 753 (La. App. 4th Cir. 1981). However, the death benefits or proceeds of a life insurance policy with a named beneficiary other than the estate of the insured owner, do not form part of the owner's estate either separate or community, but belongs to the validly designated beneficiary. *Id.* Therefore, the proceeds of a life insurance policy are not community property. Therefore, the injunction did not bar Mr. Jackson's right to change his beneficiary.

Similarly, the TRO issued in this case only prohibited the disposal of community property. Since the proceeds of a life insurance policy are not community property, even if the TRO issued was in effect on August 22, 2005, it did not bar Ms. Kreppein's right to change her beneficiary on the term life policy she owned.

The TRO was not in effect at the time Ms. Kreppein executed the Change of Beneficiary Designation. The TRO was dissolved by law when the hearing for the preliminary injunction did not go forward on August 16, 2005, as scheduled. However, even if the TRO was in effect, since the proceeds of a term life insurance policy are not community property and the First Colony Life Insurance Policy was a term life policy, the TRO did not bar Ms. Kreppein from changing the beneficiary on the First Colony Life Insurance Policy. Therefore, Ms. Kreppein was not legally precluded from executing the Change of Beneficiary

Designation on August 22, 2005 and Petitioner's Petition for Writ of Certiorari should be denied.

In his Petition, Petitioner attempts to identify an issue meriting this Court's attention, but, as seen above, seriously misrepresents well-settled Louisiana statutory and case law. Therefore, Petitioner's Writ should be denied.

CONCLUSION

For all of the reasons discussed herein, Petitioner has failed to show that the Fifth Circuit's Opinion is worthy of review by this Court. The Petition should be denied.

Respectfully submitted,

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